IN THE MATTER OF JAN WATERMAN AND THE ONTARIO HUMAN RIGHTS COMMISSION V. THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA, ROSS JOHNSON AND VINCE TONNA, AND PURSUANT TO MS. WATERMAN'S COMPLAINT BASED ON THE *ONTARIO HUMAN RIGHTS CODE*, *1981*, *ch.53*, AS AMENDED.

INTERIM DECISION

This Order covers two matters, arising from the preliminary hearing on September 4, 1992:

1 The Respondents have requested an order requiring the Human Rights Commission to produce the investigatory notes of its officers.

The request is denied. Reasons will be supplied at a later date.

2 The Respondents have submitted a list of 13 particulars, containing information which they ask the Commission to produce.

The Commission is hereby requested to supply this Board with a response, setting forth

a. which of the particulars asked for it will supply; and
b. if it is unwilling to supply any, to state the reasons therefor.

An answer should reach this Board by September 11, 1992.

Toronto, September 8, 1992

W.G.Plaut

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SECOND INTERIM DECISION

This second interim decision deals with the sequential submissions made made by Ms. Chalmers, in behalf of respondents, on September 15 and 21, the reply from the Commission on September 23, and the response thereto by Ms. Chalmers on September 24.

1. I deem point (4) of the particulars contained in the September 15 submission to have been satisfactorily met.

2. The Commission does not at this time have to submit the names of potential witnesses.

3. The Commission is asked to fulfill, at the appropriate time, its undertaking "to provide the respondents prior to the hearing with the names and an outline of the anticipated evidence of witnesses whom it intends to call. The Commission will also provide continuing disclosure of relevant documents which come into its possession and on which it intends to rely at the hearing." (Letter of Sept. 22, 1992, p.2)

4. The Case Summary alluded to in the Commission's letter (*supra*) and in Ms. Chalmers' reply of Sept, 24, has not been introduced in the hearing, and therefore I cannot at this point rule whether or not it is deficient and further information needs to be given to the respondents.

5. The hearings will go forward as scheduled, on October 5. Counsel for the respondents will be free to raise the matter of adjournment then or later.

Reasons for the above will be given at a later time.

Toronto, September 25, 1992.

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INTERIM DECISION

On September 13, 1988 Ms. Jan Waterman filed a complaint against the above-named Respondents, alleging that she had been discharged from the National Life Assurance Company of Canada ("NLA") because of her sexual orientation, and also because she had refused to infringe the right of another person, in contravention of the Ontario Human Rights Code ("the *Code*"), sections 4(1), 7 and 8 (now numbered 5, 8 and 9, as they will be cited hereafter).

At a preliminary hearing, on September 4, 1992, Respondents asked that they be given access to the notes taken in the course of the investigation by the officer of the Ontario Human Rights Commission ("Commission") who was assigned to the case. Respondents held that they could not conduct a proper defense without knowing who the witnesses that had been interviewed were, what they had said to the officer, and further whether in the report to the Commission the officer had withheld results of any interviews that might have been favorable to the defense. The Commission refused to accede to such disclosure.

This decision deals with only that issue.

THE LAW.

It has been established jurisprudence to consider the notes of the Commission's investigating officers as privileged and not subject to the inspection of Respondents. The standard precedent cited is *Salamon v. Searchers Paralegal Services* (1987), 8 C.H.R.R. D/4162, where Respondent asked for an "Analysis of Investigation" prepared in relation to the complaint. Chairman F.H. Zemans ruled on the motion.

> The respondents request the Board of Inquiry to issue a summons compelling the Ontario Human Rights Commission's investigator of this complaint to appear and produce the Commission's

> original intake questionnaire, the analysis of the investigation's findings and all other documents prepared by her that the Commission considered with respect to the complaint. The respondents also request that the Commission be compelled to reveal the names of two witnesses it intends to produce at the hearing.
>
> The Board of Inquiry refuses these requests on the grounds that there are no provisions in the *Code* or the *Statutory Powers Procedures Act* ("*SPPA*") for pre-hearing discovery. (Summary).

A recent Ontario Board of Inquiry ruled similarly. In *Adair v. K. B. Home Insulation Ltd. at al.*, 15 C.H.R.R. D/331 (1992), Chairman B. Adell said:

> The respondents asked for the full statements made by the witnesses during the course of the investigation, and for the names of witnesses. That material I would hold to be privileged...

Respondents do not argue that this has been the accepted position, but hold that a recent decision of the Supreme Court of Canada creates a new and in fact contrary precedent.

In *R. v. Stinchcombe* [1991], 3 S.C.R. 326, the Court considered the following scenario: A lawyer had been accused of breach of trust, fraud and theft. A former secretary of his was a Crown witness at a preliminary inquiry, where she gave evidence apparently favorable to the defense. After the inquiry, but before the trial began, the witness was interviewed by the police and tape recording were made of the interview. However, the witness was never called by the Crown and the application by the defense that the witness either be called or the police release the contents of the interview were rejected by the Court. The defendant was convicted and the Court of Appeal for Alberta affirmed the conviction. The Supreme Court allowed the appeal and ordered a new trial. Mr. Justice Sopinka, after reviewing the history of disclosure, said:

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information...I would add that the fruits of the investigation which are in the possession of Counsel for the Crown are not the property of

the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. (at 333)

The search for truth is advanced rather than retarded by disclosure of all relevant material. (at.335.)

There is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. (at 336.)

Where statements are not in existence, other information such as noted should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. (at 345)

However, the Court did not make the requirement of full disclosure absolute.

It is subject to the discretion of the Crown. This discretion extends both to the withholding of information and the timing of disclosure. For instance, Counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. (at 339.)

If this judgement, delivered with respect to a criminal proceeding, is applicable to human rights law, then the application of the Respondents in the instant case should be seriously entertained, subject to whatever exceptions the Supreme Court judgment would allow.

The question of the relation between criminal and human rights law was recently considered by Prof. T. Brettel Dawson in an interim decision under the *Code*, in the matter of *Anita Hall v. A-1 Collision and Auto Service and Mohammed Latif* (unreported, dated August 28, 1992).

A Board of inquiry does not determine "guilt" but rather assigns responsibility for a discriminatory act or practice. For these reasons alone I believe that it is unwise to analogize grounds of complaint in human rights legislation with conduct controlled by the criminal law

and to apply protections developed in the criminal context to other contexts (at p. 22).

Unlike a criminal charge which is laid only after a police investigation, a human rights complaint may be filed as of right. . While the Commission attempts to settle disputes informally prior to the filing of a formal complaint, it is only after a formal complaint has been filed that an investigation takes place. The investigation is non-partisan and aimed at identifying what took place and ultimately endeavouring to settle the matter in a non-adversarial manner. Unlike the laying of a criminal charge, the filing of a human rights complaint implies no suspicion on the part of the public body, of wrongdoing (p.23).

The Board also cited the Supreme Court's earlier caution that a "right or freedom may have a different meaning in different contexts" (*Edmonton Journal v. Alberta Attorney General* [1989] 2 S.C.R. at 1355). In fact, even while delivering the judgment in *Stinchcombe*, the Court cautioned that in a case of summary conviction offenses certain factors which were considered "may not apply at all or may apply with less impact". (at 342.)

Moreover, in *Stinchcombe* the potential evidence appertained to a specific witness whose testimony was not produced. In the instant case, and in the administration of the *Code* in general, the investigation is not surrounded by the prosecutorial aura associated with the police. I have no doubt that many a respondent, investigated by an officer of the Commission, feels that the powers and actions of the officer are "intrusive". However, the special powers of the Commission are never invoked when the respondent assists the Commission in establishing the facts of the case.

Moreover, while it is the purpose of the *Code* to empower the weakest elements of the population in that it makes a complaint readily available and takes on the responsibility of discerning its possible validity, experience shows that the vast majority of the complaints end in either a settlement or in the dismissal of the complaint by the Commission -- a dismissal usually recommended by the investigating officer. Fewer than five percent of all complaints proceed to a Board of inquiry.

Respondent Counsel has implied that there may be evidence in the officer's notes which is withheld because it is favorable to the Respondent, and that therefore, as in *Stinchcombe*, the notes ought to be produced.

Personal experience leads me to believe that this implication is unjustified. The officer comes to the investigation without any apprehension of who is right and who is wrong. The Commission becomes a partisan only after the Commissioners, by vote, agree that a *prima facie* infringement of the Code has occurred and therefore ask the Minister to appoint a Board of inquiry. Until then, the Commission is an impartial searcher for the truth. Its agents and officers may not always carry out their tasks to perfection, and certainly often are seen as antagonists by potential respondents, but the kind of truth shading of which the police in *Stinchcombe* were suspected should not be laid at the door of the Commission.

In this vein did Chairman P. P. Mercer, adjudicating under the *Code*, characterize the analogy with *Stinchcombe* (*Roosma and Weller v. Ford Motor Company et al.*, June 5, 1992; unreported):

> Nor is the analogy with Crown's duty in *Stinchcombe* particularly apt; the Commission's role under the *Ontario Human Rights Code* is indeed not merely adversarial but these proceedings are also clearly civil and not criminal (pp.2-3).

There is another basic reason why the officer's notes, unless relied upon by the Commission, should not be accessible to the Respondent. Officers usually find potential witnesses very hesitant to come forward; they fear for their position and are therefore assured by the officer that their privacy and anonymity will be safeguarded. Without such assurance the whole process of establishing the facts through an investigation of the case would be severely impeded. The parallel with a criminal case breaks down on this point alone.

Moreover, in *Stinchcombe* there was a special and identifiable witness whose testimony was at issue, while in the instant case no such person has been targeted by the Respondents.

The latter have also invoked the *SPPA* and have cited s. 23(1), which gives a tribunal the power to regulate its own procedures. But in the past, human rights boards have hesitated to order pre-hearing disclosures, for

which there is no provision in the *Code*, and instead have asked for the production of materials which appeared relevant to the Board after the hearing has begun, taken advantage of s. 39(4) of the *Code*.

Counsel for Mr. Johnson has stressed that, while in criminal cases the accused faces a possible jail sentence, a human rights judgment too can have serious effects on the respondent party. An adverse decision by this Board would have an impact on the respondent's reputation, and the large damages which will be asked for (over $ 150,000) are a heavy threat to her client. The rules of natural justice should prevail in human rights cases no less than in a criminal court. Counsel has in fact indicated that s. 41(6) of the *Code* will be invoked and redress be sought from the Commission.

In principle, I have sympathy with counsel's position. Natural justice makes no distinction between criminal and civil law. Mental anguish and financial loss have their own serious effects upon the life of a person, and it is not the function of a Board to establish a ranking order of what is of greater or lesser impact. Each situation, like each person, must be considered separately.

But justice has two parts, and the Complainant has hers as well. Bringing a complaint against one's employer is in itself a difficult and often wrenching step, which many potential complainants never take. The possible loss of a job looms large and, even in the best of circumstances, the employee's relationship to the employer is clouded thereafter.

I can therefore not justify the direct and unreserved application of *Stinchcombe* to the matter before me. The particularities set forth in *Stinchcombe* are sufficiently different to deem the conclusions drawn there applicable to the instant case.

Therefore, the motion to have this Board order the Commission to produce the notes of the investigating officer is denied.

Decision rendered September 8, 1992.

W. GUNTHER PLAUT, BOARD OF INQUIRY